



The Endangered Species Act 101

AN ENDANGERED SPECIES ACT PRIMER

Signed into law by President Nixon in 1973, the Endangered Species Act (ESA) aspires to prevent extinction, recover imperiled plants and animals, and protect the ecosystems on which they depend. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) are the two federal agencies responsible for the act's implementation.

Listing

For a species to gain protection under the ESA, it first must be listed by regulation as either “threatened” or “endangered,” the most vulnerable category. A proposal to list a species can arise from a petition submitted by the public or state agencies. Sometimes FWS/NMFS determines that listing a species is “warranted but precluded” by the need to list other higher priority species. The species then becomes a “candidate” for listing, a designation that offers limited protection under the ESA.

Critical Habitat

When FWS/NMFS lists a species, it generally must also designate “critical habitat,” specific areas with the physical and biological features essential for the species' conservation that need special management considerations or protection.



GREEN SEA TURTLE © ADAM VICTORINO

Recovery Plan

In addition to critical habitat designation, listing typically also requires the development of a plan that spells out the research and management actions necessary for recovery.

Consultation

Each federal agency is required to conserve listed species and to ensure that its actions are not likely to jeopardize the continued existence of these species or adversely modify or destroy their critical habitat. If a federal agency (the “action agency”) proposes to authorize, fund or carry out an action that “may affect” a listed species or its critical habitat, it must consult with FWS/NMFS. (Activities on private land with no federal involvement do not require consultation.) After consultation, the Service issues a “biological opinion” stating whether or not, in its view, the proposed action is likely to result in jeopardy or adverse modification. If the Service finds either impact likely to occur, it may propose modifications to the action to avoid violating the ESA. While the action agency can disagree and reject the Service's conclusion or recommendations, it does so at its own peril since the courts tend to defer to the wildlife expertise of the Service.



GRIZZLY BEARS © STEPHEN DACHS

Prohibited Actions

Congress imposed strict statutory prohibitions on the “take” of endangered species, but granted the secretaries of interior and commerce discretionary authority to apply these prohibitions to threatened species. “Take” includes activities such as harassing, harming and killing. “Harm” for a listed species is further defined by regulation to include significant habitat modification. While the ESA can shield listed species from significant harm, it does not directly mandate or compel private citizens to take positive conservation actions on behalf of these species. Private landowners can obtain a permit to “take” a listed species if that take is incidental to some other lawful activity, such as plowing a field or building a shopping mall. These incidental take permits are issued in conjunction with three different types of agreements:

1. Habitat Conservation Plans (HCPs).

These plans are designed to reconcile land use or development with listed species conservation. An HCP negotiated with a developer, land owner or state or local government describes the anticipated effects of proposed activities on certain listed species, includes a list of conservation measures to minimize and mitigate the impact of incidental takings as much as practical, and lists the funding available to implement the plan. When the HCP is approved, FWS issues an incidental take permit, which absolves the applicant from liability under the ESA for harm to the species.

2. Candidate Conservation Agreements with Assurances.

These agreements are intended to shield landowners who voluntarily manage their lands for the benefit of candidate species from additional land-use restrictions if the species is subsequently listed. Landowners receive assurances from FWS that if the species is listed, they will not be required to take any conservation measures beyond those to which they already agreed.

3. Safe Harbor Agreements.

Under these proactive agreements, landowners voluntarily agree to enhance the habitat of listed species on their properties and, in return, receive assurance they will not be required to take any additional conservation measures other than those to which they have already agreed. Participating landowners also receive assurances that they will not be burdened with additional restrictions on the use of their properties because of prohibitions on incidental take should the population of the listed species increases on their land.

Recovery

The goal of the ESA is to “recover” species to the point they no longer require the Act’s protections and can be delisted. The ESA has been extremely successful in preventing extinctions and has been the ultimate stopgap measure for saving species in cases where the management policies of other federal agencies have contributed to the decline of the species. Success in fully recovering imperiled species to the point where they can be delisted has been more limited.



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